



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 30, 2003

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-6857

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188538.

The Texas Department of Criminal Justice (the "department") received a request for six categories of information related to HB 1649. You state that some responsive information will be provided to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that some of the requested information is about a "releasee" and therefore is confidential under section 508.313 of the Government Code in conjunction with section 552.101.¹ In pertinent part, section 508.313 provides:

- (a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes.

for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

(b) Statistical and general information relating to the parole and mandatory supervision system, including the names of releasees and data recorded relating to parole and mandatory supervision services, is not confidential or privileged and must be made available for public inspection at any reasonable time.

(c) The department, on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

- (1) the governor;
- (2) a member of the [Board of Pardons and Paroles];
- (3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or
- (4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, "eligible entity" means:

- (1) a government agency, including the office of a prosecuting attorney;
- (2) an organization with which the department contracts or an organization to which the department provides a grant; or
- (3) an organization to which inmates are referred for services by the department.

(e) This section does not apply to information relating to a sex offender that is authorized for release under Chapter 62, Code of Criminal Procedure.

(f) This section does not apply to information that is subject to required public disclosure under Section 552.029 [of the Government Code].

Act of April 1, 2003, 78th Leg. R.S., ch. 6, § 3, 2003 Vernon's Sess. Law Serv. 6-8 (to be codified as an amendment to Gov't Code § 508.313). A releasee is a person released on parole or to mandatory supervision. Gov't Code § 508.001(9). You state that the records that you have marked are held by the Parole Division of the department and concern releasees or inmates of the department subject to release. After reviewing your arguments and the submitted information, we find that the information that you have marked is made confidential by section 508.313. The requestor does not appear to be an entity authorized to obtain this information under section 508.313(c). In addition, the marked information is not made public under section 552.029 of the Government Code,² *see* Gov't Code § 508.313(f), or under chapter 62 of the Code of Criminal Procedure,³ *see* Gov't Code § 508.313(e). Thus, we conclude that the information that you have marked is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313.

You also assert that a portion of the submitted information is excepted from disclosure under section 552.134 of the Government Code. Section 552.134(a) of the Government Code relates to inmates of the department. This section provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). A portion of the submitted records constitutes information about inmates confined in a facility operated by the department. We find that the exceptions in section 552.029 are not applicable. Therefore, the information that you have marked is excepted from disclosure under section 552.134 of the Government Code and must be withheld.

² Section 552.029 provides that, notwithstanding sections 508.313 or 552.134, certain information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under the Public Information Act.

³ Chapter 62 of the Code of Criminal Procedure relates to the registration of sex offenders and provides at article 62.08 that *registration information* is to be maintained by the Department of Public Safety in a central database which, with certain exceptions, is public information.

We next address your claim that a portion of the submitted information is protected from disclosure pursuant to the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Based upon your representations and our review of the submitted records, we find that the information that you have marked contains confidential communications exchanged between privileged parties for the purpose of rendering professional legal services, and may, therefore, be withheld under section 552.107(1).

We now turn to your argument under section 552.111 of the Government Code for the remaining submitted information. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

We have marked the information that the department may withhold under section 552.111. Upon review of the remaining information at issue, we conclude that it does not contain advice, recommendations, opinions, or other material reflecting the policymaking processes of the department. Therefore, you may not withhold any of the remaining information under section 552.111.

In summary, the information about a “releasee” that you have marked is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313. The department must withhold the information about inmates that you have marked under section 552.134 of the Government Code. The documents that you have marked contain confidential communications exchanged between privileged parties for the purpose of rendering professional legal services, and may, therefore, be withheld under section 552.107(1). We have marked the records that the department may withhold under section 552.111. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

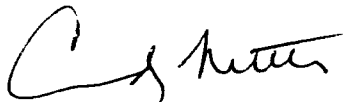
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 188538

Enc. Submitted documents

c: Ms. Gail Hile
1114 High Mesa Drive
Wimberley, Texas 78676
(w/o enclosures)